

\$2,321 for special damages and no one quarrels with that figure. A

Then he awarded \$25,000 for general damages, disability that the respondent is going to suffer and pain he is going to suffer and a certain amount of inconvenience including a certain amount of inconvenience in connection with his sexual functions. B

It is against that award of \$25,000 that the defendants have appealed and their main complaint is that it contains an element of compensation, the exact amount of which is impossible to determine, for the respondent's loss of sexual function. C

I think on the evidence it is fair to say that it is not denied that the respondent has suffered some derangement of his sexual functions. He says he is unable to obtain an erection. A European-trained doctor who has examined him says that a broken thigh bone has united badly and when he attempts to perform the sexual act this causes him pain and produces psychological consequences. D

If the matter were capable of precise financial assessment there might be something to be said for taking it further. It is not, however, capable of precise financial assessment. We have got to take the overall picture of this unfortunate man as he is now compared with what he was in the days of his youthful health and strength before he suffered from the negligent act of the second defendant and we have got to apply our minds at this stage not to the question of what is a suitable compensation but the question of whether the trial Judge's assessment of a suitable compensation is wholly erroneous. E

For myself I am inclined to the view that had I myself been sitting at first instance I would have awarded a somewhat smaller sum by way of general damages. That, however, is not the point. The point is thus put by Morris L.J. in the case of *Scott v. Musial*:—⁽¹⁾ F

"It is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three Judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial Judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the Judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered." G

I am not prepared to say that the award by Mr. Justice Ismail Khan comes within any portion of the last sentence of that passage and I would accordingly dismiss the appeal with costs. H

Hill and Barakbah JJ.A. concurred.

Appeal dismissed.

Solicitors:—George & Khoo; Shearn Delamore & Co.

MAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Suffian J.) April 21, 1963]

[Alor Star—Criminal Appeal No. 13 of 1963]

Criminal evidence—Burden of proof—Meaning of—Explanation by accused—When accused entitled to acquittal. C

The appellant in this case was charged with theft and alternatively with dishonestly retaining stolen property. He gave evidence and called witnesses in his defence at the end of which he was convicted because "on the whole" the learned Magistrate was "unable to believe the defence." D

Held: the learned Magistrate had seriously misdirected himself as to the meaning of the burden of proof by the accused in cases where it was necessary for him to rebut the prosecution case against him.

If the court accepts the explanation given by or on behalf of the accused, it must acquit. But this does not entitle the court to convict if it does not believe that explanation, for he is still entitled to an acquittal if the explanation raises a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it. E

MAGISTRATE'S CRIMINAL APPEAL.

G. N. Christie for the appellant. F

Hamzah bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian J.: This appeal is allowed only on one ground. The appellant charged with theft of two chickens and alternatively with dishonestly retaining stolen property namely one chicken gave evidence and called witnesses in his defence at the end of which he was convicted because in the words of the learned Magistrate "On the whole I am unable to believe the defence." I agree with Inche Christie, counsel for the appellant, that the learned Magistrate has seriously misdirected himself as to the meaning of the burden of proof by the accused in cases where it is necessary for him to rebut the prosecution case against him. G

The correct law for Magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, H

as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

The position may be conveniently stated as follows:—

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| (a) If you are satisfied beyond reasonable doubt as to the accused's guilt | Convict. |
| (b) If you accept or believe the accused's explanation .. | Acquit. |
| (c) If you do not accept or believe the accused's explanation .. | Do not convict but consider the next steps below. |
| (d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt | Convict. |
| (e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt .. | Acquit. |

Magistrates would assist the appellate court if they indicate in their grounds that they are aware of the tests laid down in steps (d) and (e) above.

Appeal allowed.

PUBLIC PROSECUTOR v. NGIAO NAM KHIN & ANOR.

[A.Cr.J. (Suffian J.) April 27, 1963]

[Alor Star—Kedah Criminal Appeal No. 5 of 1963]

Gaming—Public Lottery—Assisting in carrying on—Common Gaming Houses Ordinance, 1953, s.4(1)(c)—Characters lotteries—Possession of documents relating to lottery.

Criminal Evidence—Expert witness—Description of modus operandi—Duty of prosecution.

Where the Magistrate requires the descriptions by expert witness of the *modus operandi* of the characters lottery for his own enlightenment then it is the duty of the prosecution to supply them and if they fail to do so they cannot complain if the Magistrate acquits.

Before the expert witness had concluded his evidence the prosecution officer should have asked the Magistrate whether he was satisfied or required further explanation and then if the Magistrate required further explanation, the prosecution officer should have asked the expert the necessary questions to elicit the further explanation required by the Magistrate.

Cases referred to:—

(1) *Lee Seow v. Public Prosecutor* [1958] M.L.J. 245.

(2) *Choo See Kean & Ors. v. Public Prosecutor* [1959] M.L.J. 213.

A MAGISTRATE'S CRIMINAL APPEAL.

Hamzah bin Dato' Abu Samah (Deputy Public Prosecutor) for the appellant.

Lee Saik Kee for the 1st respondent.

G. N. Christie for the 2nd respondent.

Cur. Adv. Vult.

B

Suffian J.: In this case the two respondents were charged with assisting in carrying on a public lottery contrary to section 4(1)(c) of the Common Gaming Houses Ordinance No. 26 of 1953. The prosecution alleged that the lotteries concerned were 100, 1000 and 10,000 character lotteries. They proved that the respondents had been found in possession of certain documents (exhibits P1, P3, P4 and P6). If these documents were a "record of stakes or wagers in or relating to a lottery", then by virtue of section 11 of the Ordinance the respondents "shall be presumed until the contrary is proved to be assisting in a public lottery then in progress." So the prosecution called an expert witness PW9 who said in effect that the documents were records of stakes or wagers in 100, 1,000 and 10,000 character lotteries. He described them briefly, but he did not say why he thought they were records of stakes or wagers in those lotteries, nor did he describe how these lotteries were run. On this evidence the learned Magistrate could not say that they were records of stakes or wagers in or relating to a lottery, and there being no other evidence he acquitted and discharged the respondents without calling upon them to enter on their defence.

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I am of the opinion that this appeal by the Public Prosecutor should be dismissed. While it is true that a characters lottery constitutes a lottery within the meaning of the Ordinance, and summary courts have for their guidance descriptions of the operation of these lotteries in a judgment of the full Court of Appeal in *Lee Seow v. Public Prosecutor*⁽¹⁾ and therefore descriptions by expert witnesses of the *modus operandi* of the characters lottery are no longer necessary, this is so only where the Magistrate does not require such evidence for his own further enlightenment, *Choo See Kean & Others v. Public Prosecutor*⁽²⁾. Where the Magistrate as here requires such descriptions for his own enlightenment then it is the duty of the prosecution to supply them and if they fail to do so they cannot complain if the Magistrate acquits. Some Magistrates in some areas know all that there is to know about character lotteries, but there are some Magistrates who are unfamiliar with their operation.

I have myself examined the documents exhibited in this appeal and I find that they are only lists of figures. They are not necessarily